Murray-Aynsley, J.—In this case the Respondent was before the Magistrate on three charges of cheating. The facts show that in the prosecution of a fraudulent design he obtained money on different occasions. The Magistrate relying on Section 71 of the Penal Code convicted the Respondent on only one charge. In this I think he was wrong. I consider that each time he obtained a sum of money he committed a fresh offence, and therefore he should have been convicted on each of the charges.

The Magistrate sentenced the Respondent to one month's Rigorous Imprisonment. The Deputy Public Prosecutor contends that this is inadequate. I agree and order that the sentence be increased to one of three months rigorous imprisonment to date from the original conviction.

Appeal allowed—sentence enhanced.

[ORIGINAL CRIMINAL JURISDICTION]

CUSSEN, J.

August 31, 1939.

PUBLIC PROSECUTOR

v.

JOHN ALIAS ARULAPPAN AND ANOTHER.

[SELANGOR CRIMINAL TRIAL No. 40 of 1939]

Criminal Procedure Code (Cap. 6), S. 113 (iii)—Evidence Enactment (Cap. 10), Ss. 24, 25, 26 and 27—Statement made during investigation—Discovery of fact—test of Admissibility of Statement.

Where a fact is discovered as the result of a statement made by an accused person during investigation under S. 113 (iii) of the Criminal Procedure Code, the admissibility or otherwise of the statement depends not upon the truth of its contents but upon its voluntary character.

CRIMINAL TRIAL.

The two accused in this Trial were charged with murder an offence punishable under section 302 of the Penal Code.

At the Preliminary Enquiry the Assistant Superintendent of Police in charge of the investigation tendered in evidence a statement made by the Second Accused during the investigation under the provisions of section 113 (iii) of the Criminal Procedure Code (Cap. 6). In that statement she related the circumstances in which she saw a tin containing jewellery belonging to the deceased being buried. As a consequence the tin and jewellery was later recovered by the Police at the spot pointed out by the Second Accused.

The Judge, during the hearing of the Trial, held that the statement was admissible.

T. D. Wallace, Assistant Legal Adviser for Public Prosecutor.

G. W. de Silva for 1st Accused.

R. P. S. Rajasooria for 2nd Accused.

Cussen, J.—In connection with the admission of the statement made by the 2nd accused I think it is desirable that I should state the reasons why I have admitted that statement in full—at least the part in question. It is important particularly because of the passage referred to in *Ameer Ali's* commentary, a work which is so frequently quoted in the Courts. That passage states that the reason for the admission under section 27 Evidence Act of the information or statement is that the discovery of the fact is a guarantee of the truth of the statement. I disagree with that. In my opinion the principle, the reason for admissibility under that section is that the discovery of the fact is a sufficient guarantee or assurance of the voluntary character of the statement. That I think is evident from an examination of the preceding sections, 24, 25 and 26, because it is clear that the principle on which the law considers the question of the admissibility or not of statements made by accused persons is not the truth of the contents of the statements but the voluntary character of the statement itself. In other words the considerations which are set out clearly in section 24. That is what the law aims to protect or safeguard, not whether the person is speaking the truth or not; it is whether the person is giving a free and voluntary statement. That is the principle of sections 24, 25, 26 and 27 of the Evidence Enactment and also of section 113 of the Criminal Procedure Code. The discovery of the fact is a guarantee or an assurance that so much of the statement as relates distinctly to the fact is a true and voluntary statement.

Statement admitted.

[APPELLATE CRIMINAL JURISDICTION]

RAJA MUSA, Ag. J.

May 14, 1938.

PUBLIC PROSECUTOR v. GOO KIAN.

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL APPEAL No. 8 of 1938]

Penal Code (Cap. 45) S. 379—theft—Prima facie case disclosed—acquittal of accused without calling upon defence—whether acquittal justified—Criminal Procedure Code (Cap. 6) S. 173A (ii)—technical offence—conviction need not be recorded.

On a charge of theft, the prosecution having established a **prima facie** case which, if unrebutted, would have warranted accused's conviction, a Magistrate is not

justified in acquitting the accused without calling upon the defence.

Where an accused is found technically guilty of theft, the Magistrate may, if he considers it expedient, record no conviction.

MAGISTRATE'S CRIMINAL APPEAL.

The facts sufficiently appear from the Judgment below.

Brodie, Assistant Legal Adviser, for the Public Prosecutor (Appellant).

Respondent in person.

Raja Musa, Ag. J.—This is an appeal by the Public Prosecutor.

The Respondent was charged with the theft of a bicycle belonging to one Yap Fu.

The evidence led before the learned Magistrate disclosed the following state of facts.

The complainant Yap Fu left his bicycle leaning against a fowl house and locked it. A witness, Voon Yuk, testified that the Respondent and he were going to Seremban. The Respondent saw the bicycle at the fowl house and asked Voon Yuk whose bicycle it was. Voon Yuk told him it was the complainant's. The Respondent then said he wanted to borrow the bicycle to go to Seremban with, whereupon Voon Yuk told him that it was not his to lend. The Respondent nevertheless rode the bicycle away.

The complainant has said that he did not know the Respondent and had not given him permission to use the bicycle but that he (the Respondent) was known to a friend of his (the complainant's), presumably Voon Yuk.

Voon Yuk also stated that the complainant and the Respondent were working on the same banana plantation so that they might have met once or twice.

It appears that, at this stage, the learned Magistrate was informed that the only further evidence that could be adduced on behalf of the prosecution was that of arrest which would show that the Respondent was apprehended on his way back riding the bicycle. The learned Magistrate thereupon held that there was no case for the Respondent to answer and acquitted him.

The learned Magistrate has given me a very clear and able judgment.

Theft is defined in section 378 of the Penal Code as follows:—

> "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft".

The most important word in this definition, for the purpose of this case, is the word "dishonestly". Before a man can be convicted of theft his intention must be to take "dishonestly" which term the Code defines in section 24 as doing anything with the intention of causing wrongful gain to one person or wrongful loss to another. Intention can only be inferred from conduct. Wrongful gain or wrongful loss, under section 23, is gain or loss by unlawful means of property and a person is said to lose wrongfully when he is wrongfully kept out of any property. Illegality is thus the test of dishonesty.

From its definition the essential ingredients of the offence of theft are these:—

(i) taking away
(ii) movable property
(iii) in the possession of some one,
(iv) out of that person's possession
(v) without his consent and
(vi) with intent to cause wrongful gain or wrongful loss.

In this case, as at the close of the case for the prosecution, the evidence disclosed that the Respondent

(i) took away
(ii) the complainant's bicycle
(iii) which, undoubtedly, was in the complainant's possession
(iv) out of his possession by riding it away to Seremban
(v) without the complainant's consent, and
(vi) by such taking he, without doubt, *prima facie* caused wrongful loss to the complainant in that he was deprived, without his consent, of the use of his own bicycle.

The position therefore was that the prosecution had disclosed a *prima facie* case which, if unrebutted, would have warranted the Respondent's conviction.

The respondent should therefore have been called on his defence. It was open to him to rebut the inference as to his intent and the Court would then have been in a position to apply the law.

In this case however the learned Magistrate appears to have anticipated the defence without calling upon it. I consider that that was irregular.

With the learned Magistrate's exposition of the law I have no reason to quarrel but he must have all the facts before him before he can apply the law.

For instance illustration (m), upon which the learned Magistrate relied, opens with the words "A., being on friendly terms with Z." There must be evidence of such friendly relationship. Here there was no such evidence at all.

In point of fact, in order to save time and delay which would have happened if I had ordered a retrial, and with the consent of the learned Deputy and of the Respondent, I recorded the evidence of the Respondent. He corroborated Voon Yuk in every detail but admitted that he did not know the complainant at all. In view of this evidence I do not see how illustration (m) can apply.

As regards the cases cited by the learned Magistrate, namely, *Rup Lal v. Durga Prasad* reported in A.I.R. Patna, 1917, page 459, and *Nabi Baksh v. Queen Empress*, 25 Calcutta 416, they all showed that the whole of the evidence, both for the prosecution and the defence, was before the Court from which it made findings of fact and then of law.

For these reasons the learned Magistrate was wrong in stopping the case at the stage that he did. He should have called on the defence and then come to the conclusions on the whole of the evidence.

I fully endorse the statement of the learned Magistrate that the Court should be slow to convict in cases of theft which amount only to a technical breach of the section because of the stigma of a conviction.

I would however point out to the learned Magistrate the provisions of section 173A (ii) of the Criminal Procedure Code. That section is intended to cover such cases as the learned Magistrate had in mind. The Magistrate, if he considers it expedient, need not record a conviction.

In point of fact this is exactly what I did and I cautioned and discharged the Respondent.

Respondent cautioned and discharged.

[APPELLATE CRIMINAL JURISDICTION]

GORDON-SMITH, J.

April 1, 1939.

VAN LANGENBERG v. PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 7 of 1939]

Sanitary Boards Enactment (Cap. 137), Section 16 (i)—By-laws made thereunder.

The appellant, who was an architect, carrying on business in Kuala Lumpur, put up on Lot 16 Sec. 88 a hoarding affixed to a post about 5 feet high facing Ampang Street. The hoarding was a board on which were inscribed the words "Architects, T.C. Van Langenberg & Son, L.R.I.B.A., F.I.A.A." A building was in the course of erection on the Lot in question which was within the Sanitary Board and was being erected under the supervision of the appellant and he was the architect thereof. He was convicted in the Magistrate's Court, Kuala Lumpur at the instance of the Kuala Lumpur Sanitary Board with having contravened By-law No. 2 of Part IX of the By-laws made under the Sanitary Boards Enactment and fined $2/-. The appellant appealed to the Supreme Court against the conviction on the grounds (1) that the By-laws were **ultra-vires** the Enactment and therefore invalid and (2) that the Sanitary Board had no power to license sign boards or advertisements.

Held, that, as there was nothing unreasonable in the By-laws in question, and as they did not appear to be either in excess of the Statutory powers authorising them or repugnant to the Statute under which they were made or to the general principles of law, they were not **ultra vires** the Sanitary Boards Enactment and were therefore valid.

Held further, that the Sanitary Board had power to license sign boards or advertisements.

MAGISTRATE'S CRIMINAL APPEAL.

J. F. Draper, Deputy Public Prosecutor, for the Public Prosecutor.

Appellant in person.

Cur. Adv. Vult.

Gordon-Smith, J.—In this case the Appellant has been convicted in the Magistrate's Court, Kuala Lumpur, at the instance of the Kuala Lumpur Sanitary Board in that he had contravened By-law No. 2 of Part IX of the By-laws made under the Sanitary Boards Enactment Cap. 137. He was fined $2/-.

From this conviction he has appealed on the grounds that the Magistrate erred in law in that—

(a) the By-laws were *ultra vires* the Enactment and therefore invalid;

(b) the Sanitary Board had no power to license signboards or advertisements.

On ground (a) the Appellant argued and submitted that Part IX of the By-laws was *ultra vires* the Enactment on the grounds that they were unreasonable and impossible of application, and he dealt *seriatim* with such By-laws and the fees payable under By-law 8.

On ground (b) he submitted that the Board had no power to license but only to regulate and restrict and no power to charge fees for signboards or hoardings.

The facts were undisputed and were, briefly, to the effect that the Appellant, who is an architect, carrying on business in Kuala Lumpur, put on lot 16,